Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1253

THE OPERATING ENGINEERS PENSION TRUST,
Petitioner,

vs.

BETTY LOU LIONBERGER,
Respondent.

Response to Petition of Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent prays that the writ of certiorari not be issued to review the judgment of the Court of Appeal of the State of California, Second Appellate District which was filed on September 20, 1979 in said court.

Statement of the Case.

Respondent filed a dissolution of marriage proceeding in the Superior Court of California, County of Los Angeles and in said proceeding joined the petitioner and the Court divided the community property pension plan and ordered petitioner, as trustee of said plan, to pay respondent's share of said pension plan directly to her and ordered the trustee not to honor any election by the divorced husband that would

lessen respondent's community property interest in said pension. Petitioner then appealed through the California courts without any success and finally effected this present appeal.

Issues Presented.

1. Does ERISA preempt California community property laws so that the California courts may not order the petitioner to pay directly to respondent a portion of the petitioner's employee benefit plan or award respondent an interest in the plan or prohibit the petitioner from honoring an exercise of a joint and survivor/option by respondent's former husband (a member of petitioner's plan) if it would lessen respondent's interest in said plan?

REASONS WHY THE WRIT SHOULD NOT BE GRANTED OR ISSUED.

The main thrust of petitioner's petition is the recent case of *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S.Ct 802 (1979). That case involved a railroad machinist who had railroad retirement benefits under the Railroad Retirement Act and in a divorce proceeding his wife was awarded a portion of these pension rights as community property by a California court. This Court, the United States Supreme Court, on the basis or premise that Congress deliberately intended to exclude any benefit to a divorced spouse under the Railroad Retirement Act, reversed the California court.

No such Congressional intent is shown by the petitioner in the present case which is not a Railroad Retirement Act case but one under the regulation of ERISA. With the exception of one federal court, namely, *Francis v. United Tech. Corp.* (1978), for the Northern Federal District, 458 F.Supp. 84, all federal courts have held no preemption under ERISA and that the California domestic relations courts do have jurisdiction to divide ERISA pension benefits as community property. *Stone v. Stone* (1978) 450 F.Supp. 919; *Carpenters Pension Trust, etc. v. Kronschnable* (1978) 460 F.Supp. 978; *In re Marriage of Pardee* (1976) 408 F.Supp. 666. In two recent cases, the present court, the United States Supreme Court, dismissed two appeals on the ERISA issue on the ground that there was a want of a substantial federal question. *Carpenters Pension Trust For Northern California v. Campa*, 78-1445. *So. Cal. IBEW-NECA Pension Plan v. Johnson*, 78-1445. *In the case of Retirement Fund Trust of Plumbing-Heating-Piping Industry of So. Cal. v. Johns*, 78-1422, this Court denied certiorari.

The *Hisquierdo v. Hisquierdo* case is rather unique because of the Congressional intent previously stated, namely,

that divorced spouses are to be excluded from benefits arising out of the Railroad Retirement Act. A subsequent case involving a military pension is the Michigan case of *Chisnell v. Chisnell*, 78-1303. It would appear to support the unique and limiting effect of the *Hisquierdo* case wherein this Court, United States Supreme Court, allowed the Michigan court's division of a United States military pension to remain undisturbed. See also, *MMM v. Minnesota*, 78-820.

The final argument of petitioner is that the California court does not have jurisdication to order the petitioner not to honor an election by former husband that would lessen the divorced spouse's pension rights in her former husband's pension in which the petitioner is trustee. "The effect of an election by the employee spouse is to convert his pension benefits to those available under the joint and survivor annuity provisons of the Plan would be to reduce the monthly income payable during the Participant's life and increase the benefits payable after his death. Because the divorced wife's right to share in pension benefits terminates with the death of the husband of the husband, the monetary value of her interest in the pension benefits would be reduced by such an election. It was obviously this result which the trial court attempted to avert by its order prohibiting the husband from selecting the joint and survivor annuity provisions." The above quoted provision is part of the opinion of the Court of Appeal of the State of California, Second Appellate District on page 13, second paragraph and is the reason for the necessity for such a court order.

The idea that one has a right and then has less than such a right by a former husband's election would seem to be repugnant by any legal standard.

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari should not be granted.

Dated: April ...., 1980.

Respectfully submitted,

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Of Counsel.